

No. 13029

United States
Court of Appeals
For the Ninth Circuit.

DALE B. WINTERSTEEN,

Appellant,

vs.

HARRY SEMLER,

Appellee.

Transcript of Record

Appeal from the United States District Court,
for the District of Oregon

FILED

SEP 28 1951

PAUL P. O'BRIEN

CLERK

No. 13029

United States
Court of Appeals
For the Ninth Circuit.

DALE B. WINTERSTEEN,

Appellant,

vs.

HARRY SEMLER,

Appellee.

Transcript of Record

Appeal from the United States District Court,
for the District of Oregon

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

| | PAGE |
|---|------|
| Amended Answer..... | 11 |
| Bond on Appeal..... | 22 |
| Certificate of Clerk..... | 29 |
| Docket Entries..... | 26 |
| Motion for Summary Judgment..... | 11 |
| Names and Addresses of Attorneys of Record.. | 1 |
| Notice of Appeal..... | 21 |
| Order Dismissing Action as to Semler..... | 20 |
| Plaintiff's Designation of Contents of Record on Appeal..... | 25 |
| Plaintiff's Statement of Points to Be Relied Upon on Appeal..... | 24 |
| Pre-Trial Order..... | 13 |
| Second Amended Complaint..... | 3 |

NAMES AND ADDRESSES OF ATTORNEYS

KRAUSE, EVANS & KORN,

GUNTHER F. KRAUSE,

Spalding Building,
Portland, Oregon.

IRVING KORN,

Equitable Building,
Portland, Oregon.

ELAM AMSTUTZ,

Weatherly Building,
Portland, Oregon.

Attorneys for Appellant.

NORMAN L. EASLEY, and

GRIFFITH, PHILLIPS & COUGHLIN,

Electric Building,
Portland, Oregon.

LLOYD M. McCORMICK,

Failing Building,
Portland, Oregon.

Attorneys for Appellees.

In the United States District Court
for the District of Oregon

No. Civil 5715

DALE B. WINTERSTEEN,

Plaintiff,

vs.

HARRY SEMLER and JOSEPH T. BURTON,
Defendants.

SECOND AMENDED COMPLAINT

Comes now the plaintiff and leave of court having first been obtained, files this his second amended complaint and for cause of action against the defendants, and each of them, complains and alleges:

I.

Plaintiff is a citizen of the State of Washington and defendants are citizens of the State of Oregon. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

For several years prior hereto and at all times herein involved plaintiff and Gladys Wintersteen have been and now are husband and wife.

III.

During all times herein mentioned defendants were and now are duly licensed dentists practicing their profession, among other places, in the City of Portland, County of Multnomah and State of

Oregon. During all times herein mentioned defendant Joseph T. Burton was employed in his said professional capacity by defendant Harry Semler who conducts and has under his control, among other places, dental offices in the Alisky Building, Portland, Oregon. Plaintiff is informed and believes and therefore alleges that for more than nine months after the accrual of this cause of action defendant Joseph T. Burton resided out of the State of Oregon.

IV.

Said defendant Harry Semler represented to the public at large and to plaintiff's wife, Gladys Wintersteen, in particular, that he and other dentists under his employ were licensed dentists and qualified, competent and skilful in the performance of professional dentistry and particularly in the extraction of teeth. Relying upon said representations, plaintiff's said wife called at said Harry Semler's dental offices in the Alisky Building at Portland, Oregon, on or about the 8th day of July, 1948, and consulted with defendants with reference to the examination and extraction of her teeth, and thereupon, for a consideration, plaintiff's said wife employed and engaged the services of defendants in their professional capacities as dental extractionists and surgeons, in connection with the examination and extraction of such of the teeth of plaintiff's wife as might be necessary to extract.

V.

Pursuant to the advice, representations and

directions of said defendants, and relying thereon, plaintiff's said wife returned to the said dental offices of defendants on or about the 10th day of July, 1948, and thereupon at said time and place and pursuant to the advice and direction of defendants and in preparation for said extractions, plaintiff's said wife was administered a general anesthetic by defendants, as a result of which plaintiff's said wife was rendered entirely unconscious.

VI.

While plaintiff's said wife was entirely unconscious, being under the effects of said general anesthetic, said defendants did then and there extract seventeen teeth and remove the same from the mouth of plaintiff's wife. At said time and place and at all times while plaintiff's said wife was a patient of defendants and under their exclusive care, attention and control, said defendants negligently, carelessly and recklessly allowed foreign substances to pass down the throat of plaintiff's wife, which thereupon passed through her trachea and into her right lung, causing plaintiff's wife to sustain great physical pain and mental anguish, hereinafter more fully described.

VII.

The teeth of plaintiff's said wife extracted by defendants were diseased with pyorrhea and had large deposits of tartar lodged on, around and between them. Defendants were aware of said conditions.

VIII.

On or about the 19th day of July, 1948, and at the request and instruction of defendants, plaintiff's said wife returned to the dental offices of said defendants to have the stitches removed from the gums of her mouth. At said time and place plaintiff's said wife advised defendants that she was having repeated and violent coughing spells, that during said time she was discharging from her mouth a foul greenish, bile-like substance, that she was unable to sleep at night because of said coughing spells and the discharging of said substance, that she was unable to keep food on her stomach except milk and anacin, that she felt in a generally weakened physical condition, in reply to which complaints defendants failed, refused and neglected either to secure for plaintiff's said wife or to advise her to secure for herself or to render unto her any medical or any other kind of aid or assistance or counsel. At said time and place said defendants led her to believe that her symptoms, pains and sufferings complained of as aforesaid were commonly associated with the after-effects of extractions. At said time and place said defendants further advised her that there were no further dental or medical services to be rendered her except the removal of said stitches from her gums and the making and fitting of a permanent set of dentures for her.

IX.

The injuries sustained by plaintiff's wife, as hereinabove and hereinafter set forth, were directly

and proximately caused by the carelessness, recklessness and negligence of the defendants in that:

1. Defendants failed to take the necessary and reasonable precautions immediately after the extraction of her teeth to avoid foreign substances entering and passing down her throat and trachea.

2. Defendants failed, refused and neglected to secure any medical or dental or any other kind of post operative assistance or aid or counsel for her after being advised of her complaints, pains and symptoms as aforealleged.

3. On or about July 19, 1948, plaintiff's said wife advised defendants that she was having repeated and violent coughing spells, that during said time she was discharging from her mouth a foul, greenish bile-like substance, that she was unable to sleep at night because of said coughing spells and the discharging of said substance, that she was unable to keep food on her stomach except milk and anacin, and that she felt in a generally weakened physical condition, at which time defendants negligently led plaintiff's said wife to believe that her symptoms, pain and suffering complained of **as aforesaid were commonly** associated with the after-effects of extractions.

X.

As a direct and proximate result of the carelessness, recklessness and negligence of said defendants, plaintiff's wife, Gladys Wintersteen, within a period of approximately three or four days after the ex-

traction of her teeth, as aforesaid, began suffering from an upset stomach, was unable to retain anything except anacin and milk, began to suffer from severe and repeated coughing spells, and in connection therewith coughed up a foul, greenish, bile-like substance, was unable to sleep at night because of said coughing spells and the discharging of said substance, began to lose weight, and found herself in a generally weakened physical condition and in a highly nervous condition. Thereafter her said condition worsened and in addition thereto she began to suffer from aches and pains in the right side of her back. As a result thereof, plaintiff's wife, Gladys Wintersteen, required medical attention, care and treatment with the result that she had to be hospitalized and submit to bronchoscopies for the purpose of removing pus and poison from her right lung. Thereafter the condition of said lung worsened with the result that she had to be hospitalized again for further medical treatment, and in connection therewith she was required to undergo a surgical operation for the removal of an abscess in the upper region of her right lung. In connection with said operation it was necessary to remove a part of her rib in the back of her right side. Thereafter she was required to carry a tube on the right side of her back so as to allow poisonous drainage from said right lung to empty outside of her body and unto and into cotton paddings. After said operation she required further hospitalization and it was necessary for her doctors to perform a second surgical

operation and to remove another abscess in the lower portion of her said right lung. In connection with said operation it was necessary to remove parts of four of her ribs on the right side of her back. Thereafter and as a result of this operation, she was required to carry and still does carry a second tube in her back so as to allow poisonous drainage from said right lung to empty outside of her body unto and into cotton paddings. As a direct and proximate result of defendants' negligence resulting in her injuries aforesaid, she has suffered and now suffers great physical pain and mental anguish, she is unable to lie or rest or otherwise allow pressure on her back. As a further direct and proximate result of defendants' negligence, she will suffer permanent injuries to her said right lung, she will be permanently left in a generally weakened physical condition, and she will be permanently disabled from carrying on and doing the regular and normal duties of a housewife and she will continue to suffer great physical pain and mental anguish.

XI.

At the time of the extraction of said teeth, plaintiff's wife, Gladys Wintersteen, was a strong, able-bodied woman, enjoyed good health, and was capable of performing physical work and all of the duties of the maintenance of plaintiff's home. At said time she was several months past 44 years of age with a life expectancy of 25.27 years. By reason of the injuries sustained, plaintiff's wife has been to the

date of this second amended complaint and will be permanently disabled from performing many of the substantial duties of her household and will require assistance and aid from plaintiff.

XII.

By reason of the premises plaintiff has been deprived of the services, society, comfort and companionship of his wife. The ability of plaintiff's wife to render services and assistance to plaintiff has been substantially impaired and will be so for the remainder of her life. By reason of the grave injuries to his wife, plaintiff has sustained great mental pain and suffering. As a proximate result of defendants' negligence aforescribed and by reason of the premises, plaintiff has suffered damages in the sum of \$25,452.33.

Wherefore, plaintiff prays judgment against the defendants for the sum of \$25,452.33, and for his costs and disbursements incurred herein.

KRAUSE, EVANS & KORN,

/s/ IRVING KORN,

/s/ ELAM AMSTUTZ,

Attorneys for Plaintiff.

[Endorsed]: Filed February 5, 1951.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Defendant Harry Semler moves the court as follows:

I.

To dismiss the action on the ground that it appears on the face of plaintiff's second amended complaint that his action has not been timely brought.

LLOYD M. McCORMICK, and
GRIFFITH, PHILLIPS &
COUGHLIN.

By /s/ NORMAN L. EASLEY,
Attorneys for Defendant
Harry Semler.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed February 26, 1951.

[Title of District Court and Cause.]

AMENDED ANSWER

First Defense

The right of action set forth in the Second Amended Complaint did not accrue within two years next before the commencement of this action.

Second Defense

Defendants admit Paragraphs I, II, and III; admit that defendant Harry Semler represented to the public that he and the other dentists under his employ were licensed, qualified and competent dentists, and admit that plaintiff's wife relied upon such representation when she consulted with defendants regarding personal dental problems on July 8, 1949; admit that after consultation, teeth of plaintiff's wife were extracted under a general anesthetic on July 10, 1948, in the dental offices of defendant Harry Semler; admit that the teeth of plaintiff's wife were diseased with pyorrhea and that this condition was known to defendant Harry Semler; and admit that on the 19th day of July, 1948, stitches were removed from the gums of plaintiff's wife's mouth. Defendants deny each and every allegation contained in the Second Amended Complaint.

Wherefore, having fully answered plaintiff's Second Amended Complaint, defendants pray that plaintiff take nothing thereby and that judgment be entered in favor of defendants.

LLOYD M. McCORMICK, and
GRIFFITH, PHILLIPS &
COUGHLIN,

By /s/ NORMAN L. EASLEY,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed April 16, 1951.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The above-entitled cause came on regularly for pre-trial conference before the undersigned Judge of the above-entitled court on the 16th day of April, 1951; plaintiff appeared in person and by Irving Korn, one of his attorneys; defendants appeared in person and by Norman L. Easley, one of their attorneys.

The parties, with the approval of the court, submit the following:

Agreed Statement of Facts

I.

That plaintiff is a citizen, resident and inhabitant of the State of Washington, and each defendant is a citizen, resident and inhabitant of the State of Oregon; that the amount in controversy herein, exclusive of interest and costs, exceeds the sum of \$3,000.00, and that the above-entitled court has jurisdiction of the cause.

That plaintiff and Gladys Wintersteen at all times involved herein were and now are husband and wife; that defendants were and now are duly licensed dentists practicing their profession in the City of Portland, Oregon; that at all times pertinent herein, defendant Joseph T. Burton was employed in his professional capacity by defendant Harry Semler, who conducts and has under his control dental offices in the Alisky Building, Portland, Oregon, and who represented to the public and

particularly to plaintiff's wife that he and other dentists under his employ were licensed dentists and qualified, competent and skillful in the performance of professional dentistry; that plaintiff's wife relied upon such representations and consulted with defendant Harry Semler's employees regarding personal dental problems on July 8, 1948; that thereupon plaintiff's wife, Gladys Wintersteen, employed and engaged the services of defendants to extract her teeth; pursuant to defendant Harry Semler's directions, plaintiff's wife returned to defendant Harry Semler's dental offices on July 10, 1948 and at said time and place she was administered a general anesthetic by defendants, after which defendants did then and there extract and remove seventeen teeth; that at the time of the extractions, plaintiff's wife had pyorrhea; that thereafter on July 19, 1948, at the request and instruction of defendants, plaintiff's wife returned to the dental offices of defendant Harry Semler and stitches were removed from her gums; that at said time plaintiff's wife was 44 years of age, with a life expectancy of 25.27 years; that this action was filed on August 9, 1950; that continuously between September 1, 1949 and September 1, 1950, defendant Joseph T. Burton was physically present in Philadelphia, Pennsylvania, where he attended the University of Pennsylvania, and that at all other times pertinent herein defendant Joseph T. Burton was physically present in the State of Oregon; and that defendant Harry Semler has been a resident of and present in the State of Oregon continuously since July 8, 1948.

Plaintiff's Contentions Denied By Defendants

Plaintiff contends that the defendants were guilty of negligence constituting the sole and proximate cause of injuries to plaintiff's wife in the following particulars:

1. Defendants failed to take the necessary and reasonable precautions immediately after the extraction of her teeth to avoid foreign substances entering and passing down her throat and trachea;

2. Defendants failed, refused and neglected to secure any medical or dental or any other kind of post operative assistance or aid or counsel for her after being advised of her complaints, pains and symptoms;

3. On or about July 19, 1948, plaintiff's said wife advised defendants that she was having repeated and violent coughing spells, that during said time she was discharging from her mouth a foul, greenish, bile-like substance, that she was unable to sleep at night because of said coughing spells and the discharging of said substance, that she was unable to keep food on her stomach except milk and anacin, and that she felt in a generally weakened physical condition, at which time defendants negligently led plaintiff's said wife to believe that her symptoms, pain and suffering complained of as aforesaid were commonly associated with the after-effects of extractions.

Plaintiff contends that for some time prior to and at the time of said extractions his wife's teeth had

deposits of tartar lodged on, around and between them; and that during said operation and immediately thereafter, she was under the exclusive care, attention and control of defendants.

Plaintiff further contends that as a direct and proximate result of the carelessness, recklessness and negligence of said defendants, his wife acquired lung abscesses resulting in permanent physical disablement by reason of which plaintiff has been deprived of her services, society, comfort and companionship.

* * *

Defendants deny the foregoing contentions.

* * *

Defendants' Contentions Denied By Plaintiff

Defendants contend that plaintiff's action did not accrue within two years next before the commencement thereof and is, therefore, barred by the Statute of Limitations. Defendants further contend that this issue should be tried separately by the court as a matter of law.

Defendants contend that on July 10, 1948, defendant Joseph T. Burton was in immediate control of plaintiff's wife only during the time she was in the surgery room and that during the time plaintiff's wife was in the recovery room after her extractions, she was under the over-all control of defendant Harry Semler.

* * *

Plaintiff denies the foregoing contentions.

* * *

Issues to Be Determined

I.

Is plaintiff's cause of action barred by the Statute of Limitations as to either or both defendants?

II.

Should the foregoing issue as to the applicability of the Statute of Limitations be tried separately by the court as a matter of law?

III.

Was plaintiff's wife under the exclusive care, attention and control of defendants, or either of them, while she was in the surgery room?

IV.

Was plaintiff's wife under the exclusive care, attention and control of defendants, or either of them, while she was in the recovery room?

V.

Were the defendants, or either of them, guilty of negligence in any particular as charged against them and, if so, was such negligence the proximate cause of injuries, if any, suffered by plaintiff's wife?

VI.

What damages, if any, has plaintiff sustained by reason of the premises?

* * *

Physical Exhibits

Certain physical exhibits have been identified and received as pre-trial exhibits, the parties agreeing with the approval of the court that no further identification of exhibits is necessary. In the event that said exhibits, or any thereof, should be offered in evidence at the time of trial, said exhibits are to be subject to objection only on the ground of relevancy, competency and materiality. Plaintiff waives objection to the admissibility in evidence of each deposition marked as an exhibit. Defendants have notified plaintiff in writing of evidence which will be objected to and contained in said depositions.

Plaintiff's Exhibits

1. X-Ray Film (1-A through 1-H).
2. Statement of Dr. Bildstein dated November 15, 1948.
3. Receipt from Drs. Butler, et al., dated October 11, 1948.
4. Statement of Dr. Ben Wade dated November 1, 1948.
5. Statement of Physicians Medical Laboratory dated November 30, 1948.
6. Statement of Dr. Poppe dated September 9, 1948.
7. Statement of St. Vincent's Hospital dated September 9, 1948.
8. Statement of Portland X-Ray Laboratory.

9. Statement of Dr. Tuhy.
10. Matson Memorial Hospital bill.
11. Dr. Semler's original record card.
12. Deposition of Dr. Joseph T. Burton.
13. Deposition of Samuel S. Ritchie.
14. Deposition of Alice Benson.
15. Deposition of Jane Schamel.
16. Deposition of Madge Magner.
17. Deposition of Harry Semler.

Defendants' Exhibits

18. Transcript of Testimony, Gladys Wintersteen v. Harry Semler.
19. Deposition of Dale Wintersteen.
20. Deposition of Gladys Wintersteen.
21. Photostatic copy of letter from Dr. Tuhy to Paul Harris.
22. Photostatic copy of excerpts from St. Vincent's Hospital records on Gladys Wintersteen.
23. Photostatic copy of record card.

Jury Trial

Plaintiff made timely demands for trial by jury.

The parties hereto agree to the foregoing pre-trial order and the court being fully advised in the premises;

Now Orders that the foregoing pre-trial order shall not be amended except by consent of both parties, or to prevent manifest injustice; and

It Is Further Ordered that the pre-trial order supersedes all pleadings; and

It Is Further Ordered that upon trial of this case, no proof shall be required as to the matters of fact hereinabove specifically found to be admitted, but proof upon the issues of fact and law between plaintiff and defendants as hereinabove stated shall be had.

Dated at Portland, Oregon, as of the 25th day of May, 1951.

/s/ CLAUDE McCOLLOCH,
Judge.

Approved:

/s/ IRVING KORN,
Of Attorneys for Plaintiff.

/s/ NORMAN L. EASLEY,
Of Attorneys for Defendants.

[Endorsed]: Filed May 31, 1951.

[Title of District Court and Cause.]

ORDER

This matter came on for hearing before the undersigned, Judge of the above-entitled court, on May 25, 1951, on defendant Harry Semler's Motion for Summary Judgment; plaintiff appearing by his

attorneys, Krause, Evans & Korn, by Irving Korn; defendants appearing by their attorneys, Griffith, Phillips & Coughlin, by Norman L. Easley; arguments were heard, and the court being fully advised,

It Is Hereby Considered, Ordered and Adjudged that defendant Harry Semler's Motion for Summary Judgment be, and it hereby is, allowed, and that plaintiff's cause of action against defendant Harry Semler be, and it hereby is, dismissed.

Dated at Portland, Oregon, this 25th day of May, 1951.

/s/ CLAUDE McCOLLOCH
Judge.

[Endorsed]: Filed May 28, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Harry Semler and Lloyd M. McCormick,
Norman L. Easley and Griffith, Phillips and
Coughlin, your Attorneys

Notice is hereby given that Dale B. Wintersteen, Plaintiff above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order allowing Defendant Harry Semler's motion for summary judgment and dismissing the cause herein against said Defendant Harry Semler, said

order having been entered in the above-entitled action on the 25th day of May, 1951.

Dated at Portland, Oregon, this 21st day of June, 1951.

KRAUSE, EVANS & KORN,
/s/ GUNTHER F. KRAUSE,
/s/ ELAM AMSTUTZ,
/s/ IRVING KORN,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed June 21, 1951.

[Title of District Court and Cause.]

BOND ON APPEAL

To Harry Semler and Lloyd M. McCormick,
Norman L. Easley and Griffith, Phillips and
Coughlin, your Attorneys

Whereas, lately in the United States District Court of the District of Oregon in a cause pending in said Court between Dale B. Wintersteen, Plaintiff, and Harry Semler and Joseph T. Burton, Defendants, an order was made and entered allowing Defendant Harry Semler's motion for summary judgment and dismissing the cause herein against said Defendant Harry Semler, and the said Dale B. Wintersteen having filed in said Court a notice of appeal to reverse the said order in the said

cause in which, notice was given that appeal was taken to the United States Court of Appeals for the Ninth Circuit,

Now, Therefore, we, Dale B. Wintersteen, the above-named, as principal, and Standard Accident Insurance Company, a Michigan Corporation as Surety, are held and firmly bound unto said Harry Semler, in the sum of \$250.00, the said bond being conditioned to secure the payment of said Harry Semler's costs of the Plaintiff's appeal is dismissed or the order affirmed, or such costs as the said United States Court of Appeals for the Ninth Circuit may award if the said order is modified.

Sealed with our seals and dated this 21st day of June, 1951.

/s/ DALE B. WINTERSTEEN,

[Seal] STANDARD ACCIDENT
 INSURANCE COMPANY,

/s/ J. NIAIRD,

Surety,

Attorney-in-fact.

Receipt of copy acknowledged.

[Endorsed]: Filed June 21, 1951.

[Title of District Court and Cause.]

PLAINTIFF'S STATEMENT OF POINTS TO
BE RELIED UPON ON APPEAL

To Harry Semler and Lloyd M. McCormick, Norman L. Easley, and Griffith, Phillips and Coughlin, your Attorneys:

Dale B. Wintersteen, Plaintiff above named and Appellant in the above-entitled action to the United States Court of Appeals of the Ninth Circuit, intends upon his appeal to rely upon the following points:

I.

The Court erred in entering its order allowing Defendant Harry Semler's motion for summary judgment and adjudging that Plaintiff's cause of action against Defendant Harry Semler be dismissed on the ground that the same was barred by reason of the Plaintiff's failure to commence his action within Two (2) years after the date of the accrual thereof.

Dated at Portland, Oregon, this 21st day of June, 1951.

KRAUSE, EVANS & KORN,

/s/ GUNTHER F. KRAUSE,

/s/ ELAM AMSTUTZ,

/s/ IRVING KORN,

Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed June 21, 1951.

[Title of District Court and Cause.]

PLAINTIFF'S DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

To Harry Semler and Lloyd M. McCormick, Norman L. Easley, and Griffith, Phillips and Coughlin, your Attorneys:

Dale B. Wintersteen, Plaintiff above named and Appellant in the above-entitled action to the United States Court of Appeals of the Ninth Circuit, hereby designates the following portions of the records and proceedings in this cause to be contained in the record on appeal:

Plaintiff's second amended complaint.

Defendant Harry Semler's motion for summary judgment filed against the second amended complaint.

The amended answer to Plaintiff's second amended complaint.

The pre-trial order.

Plaintiff's notice of appeal and bond on appeal.

This designation.

Plaintiff's statement of points to be relied on at the appeal.

Dated at Portland, Oregon, this 21st day of June, 1951.

KRAUSE, EVANS & KORN,
/s/ GUNTHER F. KRAUSE,
/s/ ELAM AMSTUTZ,
/s/ IRVING KORN,

Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed June 21, 1951.

[Title of District Court and Cause.]

DOCKET ENTRIES

1950

Aug. 9—Filed complaint.

Aug. 9—Issued summons to marshal.

Aug. 11—Filed summons with marshal's return.

Aug. 14—Filed amended complaint.

Aug. 14—Filed praecipe for issuance of summons
on 1st amended complaint.

Aug. 14—Issued summons on 1st amended com-
plaint—to marshal.

Aug. 23—Filed praecipe for issuance of summons
on 1st amended complaint on Harry Sem-
ler.

Aug. 23—Issued summons on 1st amended com-
plaint for Harry Semler—to marshal.

Aug. 24—Filed 2 summons with returns on 1st
amended complaint.

Sept. 5—Filed motion of deft. for summary judg-
ment.

Sept. 5—Filed affidavit of mailing.

Oct. 26—Filed notice of plntf. to take depositions
of Dr. Joseph T. Burton, et al.

Oct. 26—Issued 7 subpoenas—to marshal.

Oct. 27—Filed motion for order for subpoena duces
tecum.

Oct. 27—Record of hearing on above motion and
order taking under advisement.

Oct. 27—Filed notice of request for hearing on
motion for summary judgment.

Oct. 30—Filed 7 subpoenas with returns.

1950

Oct. 30—Entered order setting hearing on motion for summary judgment on Nov. 13, 1950, at 10 a.m.

Nov. 2—Filed and entered order for issuance of subpoena duces tecum.

Nov. 2—Issued subpoena duces tecum—to marshal.

Nov. 13—Record of hearing on deft's motion for summary judgment and order taking under advisement.

Nov. 9—Filed subpoena with return.

Dec. 5—Filed deposition of Joseph T. Burton.

Dec. 8—Filed deposition of Dale B. Wintersteen.

1951

Jan. 31—Filed application for leave to file second amended complaint.

Feb. 5—Filed and entered order granting leave to file 2nd amended complaint.

Feb. 5—Filed 2nd amended complaint.

Feb. 5—Filed praecipe for issuance of summons on 2nd amended complaint.

Feb. 5—Issued summons on 2nd amended complaint to marshal.

Feb. 5—Entered order reserving motion for summary judgment to time of pre-trial conference.

Feb. 5—Entered order setting for pre-trial conference on Feb. 26, 1951.

Feb. 12—Filed summons with return.

Feb. 17—Entered order resetting for pre-trial conference March 5, 1951.

1951

Feb. 26—Filed answer of Deft. Joseph T. Burton to plff's second amended complaint.

Feb. 26—Filed motion for summary judgment.

Mar. 5—Filed pltf's demand for jury trial.

Mar. 5—Record of pre-trial conference, entered order denying motion for summary judgment and order setting for further pre-trial conference April 16, 1951.

Apr. 16—Filed amended answer.

Apr. 16—Filed motion for leave to file amended answer.

Apr. 16—Filed stipulation for leave to file amended answer.

Apr. 16—Filed and entered order to file amended answer.

Apr. 16—Record of pre-trial conference and order continuing to April 23, 1951.

Apr. 30—Record of submission of pre-trial order, entered order setting for trial May 30, 1951.

May 3—Issued subpoena—4 copies—to Atty. Korn, Equitable Bldg.

May 4—Entered order resetting for trial on May 31, 1951.

May 22—Filed subpoena with return.

May 25—Record of hearing on motions of defts. for summary judgment; argued and order allowing motion of Harry Semler and reserving motion as to Deft. Joseph T. Burton.

1951

May 28—Filed order allowing motion for summary judgment as to Deft. Semler.

May 25—Entered pre-trial order (as of May 25, 1951).

May 31—Filed pre-trial order.

June 7—Filed motion of plntf. to amend judgment.

June 11—Entered order allowing motion for summary judgment as to Deft. Harry Semler.

June 13—Entered order reserving to time of trial motion for summary judgment as to Deft. Burton.

June 21—Filed notice of appeal by Dale B. Wintersteen.

June 21—Filed bond on appeal.

June 21 —Filed plntf's statement of points.

June 21—Filed plntf's designation of record.

CERTIFICATE OF CLERK

United States of America,

District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents, consisting of Second Amended Complaint, Motion for Summary Judgment, Amended Answer, Pre-trial Order, Notice of Appeal, Bond on Appeal, Statement of Points, Designation of Record, and Transcript of Docket Entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 5715, in which Dale B. Wintersteen

is plaintiff and appellant, and Harry Semler and Joseph T. Burton are defendants and appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 20th day of July, 1951.

[Seal] LOWELL MUNDORFF,
Clerk.

By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 13029. United States Court of Appeals for the Ninth Circuit. Dale B. Wintersteen, Appellant, vs. Harry Semler, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed July 26, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.